

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 2268 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

KALPANABEN MAHESHKUMAR SHAH

Versus

MAHESHKUMAR DAHYALAL SHAH

Appearance:

MR PRASHANT G DESAI for Petitioner

MR PB MAJMUDAR for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL

Date of decision: 17/04/97

ORAL JUDGEMENT

By means of filing this appeal under section 28 of the Hindu Marriage Act, 1955, appellant wife has challenged the decree of Divorce dated September 14, 1993 passed by the learned Judge, City Civil Court, Ahmedabad in Hindu Marriage Petition No. 331 of 1991 by which

marriage solemnized between the appellant and respondent is dissolved on the ground of cruelty and desertion.

During the course of hearing of the appeal, the parties have arrived at an amicable settlement out of court and presented consent terms dated April 17, 1997. The consent terms read as under :-

"CONSENT TERMS

The parties to the present First Appeal have arrived at the following consent terms and they request the Hon'ble Court to pass the order accordingly. The appellant wife Kalpanaben Maheshkumar Shah requests the Hon'ble Court to pass the order after realisation, as full and final payment, of the DD No. 000497 for Rs. 3 lacs dated 15-4-1997 in favour of Kalpanaben Maheshkumar Shah Bank's name Bank of Baroda.

1. Both the parties agree that the judgement and order passed by the learned Judge of the City Civil Court in Hindu Marriage Petition No. 331 of 1991 be quashed and set aside.
2. The parties further agree that they are residing separately for a period of more than 9 years (nine years) and the relation between the parties are strained to such an extent that there is not chance or marriage being retrieved and therefore both the parties agree that since they are residing separately for a period of more than 9 years (nine) they request the Hon'ble Court to declare their marriage as dissolved subject to the following conditions :-

- (A) The respondent husband has given Rs. 3,00,000/= (Rupees Three lacs only) by a crossed Demand Draft drawn in the favour of the appellant, Bank's name Bank of Baroda dated 15-4-1997, D.D No. 000497 in favour of Bank payable at Ahmedabad in full and final settlement of all the claims towards future maintenance and by way of permanent alimony of the appellant wife and minor daughter Miki. The Respondent husband has given DD amount of Rs. 3,00,000/= (Rupees Three lacs only) subject to realisation of aforesaid D.D.

(B) Respondent husband further agrees to return to the appellant wife all appellant wife's Kalpnaben Maheshkumar Shah's clothes, belongings, utensils, and ornaments, etc. lying at her marital home and he further agree to handover these things to the appellant wife in the court before inviting the order and in fact husband has returned the same before inviting the order. The respondent husband assure not to harass appellant and withdraw allegations made against appellant wife Kalpnaben Maheshkumar Shah and minor daughter Miki.

3. The parties agree that in view of the above consent terms the relation between them as husband and wife has come to an end for all practical purposes and they are no longer insisting or asserting any right in respect of the marriage or owing any duty in respect thereof.

4. The custody of minor girl child Miki shall remain with the appellant wife and respondent will not have any right to visit her or shall owe any duty in respect of the said daughter.

4.A The appellant agrees to withdraw Criminal Appln. No. 118 of 1992 filed by her under section 125 Cr.P.C before the Criminal Court as well as the recovery application filed by her.

5. These consent terms have been signed by the parties by free will and after considering the entire aspects of the matter.

The aforesaid consent terms may be taken on record and necessary orders may be passed.

Submitted on this the 17th day of April, 1997.

These consent terms are read-over to the parties and they are also explained and interpreted in Gujarati and after knowing fully the implications and consequences of the same they have agreed to sign the same.

Sd/- Sd/-
Appellant Respondent

Read over and explained in Gujarati

Sd/-

Advocate for Appellant

Sd/-

Advocate for Respondent"

The appellant ie., Smt. K.M Shah is present in the Court. She has been identified by her learned counsel Mr. P.G Desai. She has stated before the Court that the Consent Terms are read over and explained to her and she has signed the terms after fully understanding the implications and consequences of the same. Similarly, the respondent Mr. M.D Shah is personally present before the Court. He is identified by his learned advocate Mr. Majumdar. He has stated before the Court that the Consent terms have been read over and explained to him, and after understanding fully the implications and consequences of the same, he has put his signature on the consent terms. The consent terms are also signed by the learned advocates appearing for the respective parties.

The appellant and respondent have agreed that since they are residing separately for a period of more than nine years, the Court should dissolve the marriage by mutual consent, subject to the terms stipulated in the agreement. Under the Hindu Marriage Act, the spouses desiring divorce by mutual consent have to present a joint petition. The requirements are : (a) they have been living separately for a period of one year, (b) they have not been able to live together, and (c) they have mutually agreed that the marriage should be dissolved. Here in this case all the three ingredients are established and therefore divorce cannot be refused. The consent terms are duly signed by the appellant and the respondent. In the consent terms the spouses have expressed unequivocal desire to obtain divorce by mutual consent. The consent terms and duly presented to the court by both the parties to the marriage together. Therefore taking into consideration all these circumstances, the consent terms are treated as a joint petition presented by the spouses to the court for obtaining divorce as contemplated by Section 13B of the Hindu Marriage Act, 1955. It is an admitted fact that since February 24, 1988 both the parties are residing separately from each other. The relationship between the parties are strain to such an extent that there is no

chance of marriage being retrieved. There is no manner of doubt that parties to the marriage are living separately for a period of more than 1 year and have not been able to live together. They have mutually agreed that the marriage be dissolved. During the pendency of the First Appeal also, attempts were made by me to salvage the marriage but without any success. The ground for dissolution of the marriage by decree of divorce i.e., mutual consent is clearly and categorically enumerated, in consent terms. It is well settled that provision of Section 13 B (2) are directory and not mandatory. As held by the High Court in the case of Dr. Dhiren Harilal Garasia v. Mansu @ Mina Chamanlal Dangi 1987 (2) GLH p-291 provision contained in Section 13B (2) of the Hindu Marriage Act, 1955 cannot come in the way of Appellate Court in passing decree for divorce by mutual consent, in a given case even before the expiry of six months from the date of presentation of the petition. After presentation of consent terms, I have heard the parties and made inquiries about the correctness of the ground for dissolution of marriage as set out in the consent terms. On inquiry, I am satisfied that the mutual consent is free from coercion or duress and therefore the marriage between the parties deserves to be dissolved in view of their mutual consent, under section 13B of the Hindu Marriage Act, 1955.

For the foregoing reasons, the Consent Terms are ordered to be taken on record. The decree of divorce dated September 14, 1993 passed by the learned Judge, City Civil Court, Ahmedabad in Hindu Marriage Petition No. 331 of 1991 is hereby quashed and set-aside. Appeal to that extent stands allowed. However, marriage between the appellant and respondent which took place on May 29, 1983 is hereby dissolved under Section 13B of the Hindu Marriage Act, 1955 subject to terms stipulated by the parties in consent terms.

Office is directed to draw an appropriate decree under Section 13B of the Hindu Marriage Act, 1955. Having regard to the facts of the case, there shall be no order as to costs.

Prakash*

